(a) . . . .

(b) the transfer or transmission of the right or interest of any Malay in reservation land, and

(c) the transfer or transmission of any reservation land acquired by virtue of this section, by any person not being a Malay,

to any person not being a Malay, subject to the imposition of such restrictions in interest and such conditions in the document of title and such terms of rent as he may think fit: . . . ."

Mr. Lim Kean Chye cited to us several cases in support by analogy of his contention that the agreement or memorandum made at the time when it was still registered in the name of a Malay was an attempt to dispose of Malay reservation land and was therefore null and void under section 12 of the Kelantan Malay Reservations Enactment.

With respect, in my view, this question could be solved this way. If you read section 12(i) carefully, it will be apparent that only attempts to deal in Reservation land contrary to the provisions of the Enactment (the underlining is mine) would be null and void so that though the agreement between the two parties could be regarded as an attempt to deal in reservation land it is not in my view, an attempt to deal in the land contrary to the provisions of the Enactment.

My reasons are simply this. Section 13A(i) of the Enactment gives the power to His Highness the Ruler in Council in his discretion to approve a transfer of a right or interest of any Malay in Reservation land to any person not being a Malay. Since the Enactment itself has provided a method of effecting a transfer of a Reservation land from a Malay to a non-Malay, I am unable to come to the conclusion that any agreement to transfer such land by a method so provided by the Enactment itself, can be said to be contrary to the provisions of the Enactment and therefore null and void under section 12; nor could it be said that the agreement is an attempt to evade the provisions of the Enactment. (See judgment of Thomas C.J. in *Idris bin Haji Mohamed Amin* v. *Ng Ah Siew* [1] at page 258).

In the circumstances, I would hold that the agreement is not null and void.

The appeal is therefore dismissed with costs.

Barakbah L.P. and **MacIntyre F.J.** concurred.

Appeal dismissed.

Solicitors: *Wilson & Co.; Wrigglesworth & Co.*

K.R. TAXI SERVICE LTD. & ANOR. v. ZAHARAH & ORS.

[F.C. (Ong Hock Thye, Suffian and McIntyre F.JJ.) October 15, 1968]

[Kuala Lumpur—Federal Court Civil Appeal No. X15 of 1968]

Negligence — Highway — Duty of driver of motor vehicle — Duty is only to exercise reasonable care but not to be a perfectionist — No strict liability.

Damages — Fatal accident — Civil Law Ordinance, 1956, ss. 7 & 8 — "Gratuity" money given by government to assist deceased's family — Whether deductible.

This was an appeal against the decision of the High Court in an action for damages against the driver of two motor vehicles involved in a collision which resulted in the death of a passenger in one of them. The learned trial judge held that the driver of the car (3rd respondent) was primarily to blame but assessed the liability of the taxi driver (2nd appellant) at 25 per cent. He found that the 3rd respondent was to blame as he was negligent in turning across the path of oncoming traffic but he also found that the taxi driver was to blame as he should have anticipated the common folly of motor-car drivers to cross the line of oncoming traffic. He awarded damages under section 7 of the Civil Law Ordinance at $26,000 and under section 8 at $3,500 merged with that under section 7. He also held that no deduction was to be made in respect of a sum of $20,000 given to the family of the deceased by the State Government. The appellants appealed against the apportionment of liability.

Held: (1) the duty of a driver is only to exercise reasonable care; he is not under a duty to be perfect in the sense of being able to anticipate other drivers acting in a negligent or irresponsible manner;

(2) in this case there was no evidence to show that the taxi driver failed to exercise ordinary care and skill and therefore he could not be held to blame for the accident.

Per Raja Azlan Shah J. in the court below: " 'Gratuity' in the proviso [to section 7(3) of the Civil Law Ordinance, 1956] must be construed as apt to include all direct payments of money by third parties to the dependants as a measure of assistance. Such benefit is not deductible."

Cases referred to:—

(1) *Brophy* v. *Shaw* (unreported) *The Times*, June 25, 1965, [1965] C.L.Y. 2677 C.A.

(2) *Edwards* v. *Nobbs* (1963), 1st Supplement to *Bingham's* All the Modern Cases on Negligence (2nd Ed.) unreported Court of Appeal decision.

(3) *London Passenger Transport Board* v. *Upson* [1949] A.C. 155, 173.

In the court below *R.S. Sodhy* appeared for the plaintiff, *G.T.S. Sidhu* for the 1st defendant, *Denis Murphy* for the 2nd and 3rd defendants. The following judgment was delivered on February 6, 1968.

Raja Azlan Shah J.: This is a claim for damages under sections 7 and 8 of the Civil Law Ordinance, 1956. The facts are as follows.

On 6th August 1964 the deceased, Mohamed Noor bin Sulaiman, was a passenger for reward in a taxi driven by defendant No. 3 and owned

by defendant No. 2. He was returning from a State Assembly meeting in Kuantan, and on that fatal day the taxi met with an accident with a motor-car owned and driven by defendant No. 1 at the junction of Maran-Chenor Road. Maran Road, which runs from Maran to Temerloh, is a major highway; it is fairly wide and fairly straight and at certain places the road curves. The said junction is on the brow of a hill. Therefore, as one climbs the slope from the direction of Temerloh the view in front is obstructed. As one gets to the top, visibility is about 150 to 160 yards, but after that the view is obscured by the depression. In like manner, anyone coming from the direction of Maran and who has reached this depression will not be able to see the top.

Defendant No. 1 was coming from Temerloh and intended to turn into Chenor Road which is on the offside of the Maran Road. He said he stopped at a spot opposite the side road in order to see whether it was safe to cross and also to change gear as the side road was on an incline. He set his right trafficator to indicate his intention. According to him, visibility in front was about three chains; beyond that the road drops and visibility was nil. He saw no on-coming vehicle. After changing gear he looked again, but at that time he said he saw the taxi coming at a very fast speed on the crown of the road and it collided with his car. He maintained that his car was stationary. In short, his version is that the taxi came at an excessive speed on the crown of the road and collided with his car which was stationary.

In my view, the facts do not support his story. The broken glass found on the car's wrong side of the road tells a different story. The damage to both the vehicles also puts his story on a different plane. I am satisfied and so hold that the accident happened when the motor-car was crossing from its correct side of the road towards the opposite side. The sketch-plan bears that out. Upon the facts, the driver of the car was guilty of negligence. A driver in turning across the path of on-coming traffic is not absolved from the prescribed duty to see that he must not endanger approaching traffic.

Another point for consideration is this. It was alleged that the driver of the taxi was guilty of contributory negligence. It was said that he drove at an excessive speed when approaching a junction which was obstructed from his view. It was further suggested that had he kept a proper look-out he could have avoided the accident. In answer it was contended that to impute the taxi-driver with negligence three things must co-exist: (i) a duty to take care; (ii) a failure to perform that duty; (iii) damage resulting from that failure. (See 4th edn. *Mazengarb's* Negligence on the Highway, p. 96). So far, that contention is unassailable. But it was pressed in argument that in the circumstances of the present case the taxi-driver owed no duty to anyone. The driver of the motor-car crossed the road in the path of the approaching taxi which had the right of way.

In my view, the fact that the taxi-driver had the right of way does not absolve him from putting out of consideration the possible negligence of his neighbours when experience shows such negligence to be common. When the taxi-driver came up the gradient he had a clear view of some 150 to 160 yards in front of him. It may be that he could not see the approaching motor-car in view of the depression on the other side. But when it did reach the brow of the hill he had a clear view of the approaching motor-car. From then on, a prudent driver would have anticipated, in view of the junction in front, the common folly of motor-car drivers to cross the line of on-coming traffic when they think it would be safe when in fact it is not. It is also common experience that many motor-car drivers do not behave with reasonable care when using the road. In the present case, speed and failure to keep a proper look-out are therefore proper considerations when considering contributory negligence. It is here that the taxi-driver is bound in law to regulate his conduct in a manner so that he can anticipate that common folly, that is, by reducing speed and by keeping a proper look-out. In that respect I find from the evidence he had failed, resulting in damage to another. As I have said in a previous case, the *culpa* is in permitting oneself to have a blank mind in circumstances which call for advertence. I assess his liability at 25 per cent.

I will now consider quantum. As regards general damages, under section 7 of the Civil Law Ordinance, 1956, it is first necessary to consider the expectation of life of the deceased. He was a healthy and happy man, aged 56 years, at the time of his death. I take his natural expectation of life was 13 years, but I reduce that to a conventional expectation of life of 10 years to make allowances for all the uncertainties of the future.

I next determine the loss of support. The deceased was a Pahang State Assembly man and and had been returned three times. At the time of death he was just commencing his third term in office which would have taken him to the year 1969, and I see no reason why he would not have been re-elected for the fourth time and that would have taken him to 1973. That would cover his expectation of life of 10 years. With effect from July 1964 he was entitled to a remuneration of $500 per month. If I were to accept the widow's evidence, all the deceased's income would have been exhausted towards the children's schooling expenses, the widow's monthly

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pocket expenses, and the household expenses (out of which the deceased had his meals) which would total exactly $500. That, to my mind, is a bit far-fetched. Taking into account all relevant considerations including the fact that the deceased was an active political figure who required "political helpers", the necessity to settle his debt, and also not ignoring the fact that he had to entertain his voters from time to time I estimate that he would out of his income have applied a sum of $300 per month towards the support of his family. The present value of this would be $36,000. From that amount deduction must be made on the following considerations: (1) the fact that at date of trial the son Mustapha has passed form 5 and is at present undergoing training as a teacher at the Language Institute in Kuala Lumpur, thus no longer depending on the deceased had he lived; that the son Zainuddin has passed standard 7 at the Islamic School, Kuala Kangsar, and following the natural course of events would have graduated in a few years' time, thereby improving his financial position; (2) the possibility that the widow and children might have died before he did; and (3) the slim possibility that the widow, aged 41 years, might re-marry. I would in the final analysis assess a sum of $26,000 under section 7.

The conventional figure of $3,500 under section 8 is merged in the higher award mentioned above.

No deduction is to be made in respect of the sum of $20,000 given to the family of the deceased by the State Government. It is to be observed that out of that sum, $10,000 was for the purpose of building a house for the dependants and the other $10,000 was given to the Public Trustee on trust for the dependant children. It is manifest that the money was given in order to assist the deceased's family; that being so, the benefit was paid as a result of the deceased's death; but the penetrating question is whether it is "gratuity" within the contemplation of the proviso to section 7(3) of the Civil Law Ordinance, 1956. There is no definition or delimitation of the word "gratuity" in the Ordinance. English authorities were cited to suggest that such benefit has to be deducted, but with respect, those authorities were decided anterior to the U.K. Fatal Accidents Act, 1959, which replaced the relevant section of the previous U.K. Fatal Accidents Act 1846. I have not been referred to any authority under section 2 of the U.K. Act of 1959 (which corresponds to the proviso to section 7(3) of our Civil Law Ordinance). The matter can therefore be considered free from the constraint of judicial authority. In my view, "gratuity" in the proviso must be construed as apt to include all direct payments of money by third parties to the defendants as a measure of assistance. Such benefit is not deductible: see also 12th edn., *Mayne & McGregor* on Damages, para. 843.

I accordingly give judgment in favour of the plaintiffs as follows:—

(1) Special damages: $750 for funeral expenses as agreed. This amount is to be paid direct to the widow.

(2) General damages: $26,000 to be apportioned on the following basis:—

(a) Widow	$10,000
(b) Mustapha b. Mohd. Noor	1,500
(c) Zainuddin b. Mohd. Noor	1,500
(d) Mohd. Kamal b. Mohd. Noor	2,000
(e) Ahmad Bashir b. Mohd. Noor	3,000
(f) Noraihan bte. Mohd. Noor	4,000
(g) Azmi b. Mohd. Noor	4,000

The award in respect of (d) to (g) is to be paid to the Public Trustee on trust for the minors.

Costs are to be paid by the defendants in proportion to their respective liabilities.

From the above decision the second and third defendants appealed to the Federal Court.

FEDERAL COURT.

H.E. Cashin for the appellants (2nd and 3rd defendants).

G.T.S. Sidhu for the 3rd respondent (1st defendant).

Cur. Adv. Vult.

Ong Hock Thye F.J.: This is an appeal against a decision of the High Court on apportionment of liability for contributory negligence in an action for damages against the drivers of two motor-vehicles involved in a collision which resulted in the death of a passenger in one of them.

The learned trial judge had held the Penghulu (3rd respondent) primarily to blame but also assessed the liability of the taxi-driver (2nd appellant) at 25 per cent. We allowed the appeal and now state the grounds of our decision.

On August 6, 1964 Mohamed Noor bin Suleiman, a Pahang State Assemblyman, was a passenger in the appellants' taxi travelling from Kuantan to Temerloh along the Maran trunk-road when a private motor-car, owned and driven by the Penghulu of Kuala Bera, Temerloh, going in the opposite direction, suddenly crossed the path of the taxi in order to turn off into a minor side-road on his right leading to Chenor. In the resultant collision the assemblyman suffered fatal injuries.

In due course an action claiming damages for negligence was brought against the Penghulu and the owners and driver of the taxi. The Penghulu stated in evidence that he had stopped at a spot opposite the side road to see whether it was safe to cross and he had set his traffic indicator to signal his intention. The highway ahead was clear for about three chains, beyond which he could not see because of a dip in the road. As the learned trial judge tersely put it, "his version was that the taxi came at an excessive speed on the crown of the road and collided with his car which was stationary." The judge, however, rejected this story and found as a fact that "the accident happened when the motor-car was crossing from its correct side of the road to the opposite side" and held that "upon the facts the driver of the car was guilty of negligence. A driver in turning across the path of oncoming traffic is not absolved from the duty to see that he must not endanger approaching traffic." With this conclusion I would, with respect, express my complete agreement.

The learned judge then went on to consider the legal position of the taxi driver. Since this is where my brethren and I respectfully take a different view, I shall quote the judgment on this point in full:—

"Another point for consideration is this. It was alleged that the driver of the taxi was guilty of contributory negligence. It was said that he drove at an excessive speed when approaching a junction which was obstructed from his view. It was further suggested that had he kept a proper look-out he could have avoided the accident. In answer it was contended that to impute the taxi-driver with negligence three things must co-exist: (i) a duty to take care; (ii) a failure to perform that duty; (iii) damage resulting from that failure. (See 4th edn. *Mazengarb's* Negligence on the Highway, p. 96). So far, that contention is unassailable. But it was pressed in argument that in the circumstances of the present case the taxi-driver owed no duty to any-one. The driver of the motor-car crossed the road in the path of the approaching taxi which had the right of way.

In my view, the fact that the taxi-driver had the right of way does not absolve him from putting out of consideration the possible negligence of his neighbours when experience shows such negligence to be common. When the taxi-driver came up the gradient he had a clear view of some 150 to 160 yards in front of him. It may be that he could not see the approaching motor-car in view of the depression on the other side. But when it did reach the brow of the hill he had a clear view of the approaching motor-car. From then on, a prudent driver would have anticipated, in view of the junction in front, the common folly of motor-car drivers to cross the line of oncoming traffic when they think it would be safe when in fact it is not. It is also common experience that many motor-car drivers do not behave with reasonable care when using the road. In the present case, speed and failure to keep proper look-out are therefore proper considerations when considering contributory negligence. It is here that the taxi-driver is bound in law to regulate his conduct in a manner so that he can anticipate that common folly, that is, by reducing speed and by keeping a proper look-out. In that respect I find from the evidence he had failed, resulting in damage to another. As I have said in a previous case, the *culpa* is in permitting oneself to have a blank mind in circumstances which call for advertence, I assess his liability at 25 per cent."

We have considered it necessary to make a ruling in this case because, in our judgment, the principle which was stated by the learned judge seems to us to have gone too far. Authority for the view we take is to be found in the Court of Appeal judgment delivered in 1965 by Willmer L.J. in *Brophy* v. *Shaw*.[1]

Since I can trace no other published report of this case I think perhaps it is just as well to quote from *The Times* report at some length:—

"LORD JUSTICE WILLMER said that shortly before midnight on November 9, 1963, the defendant was driving a Triumph motor car along Aigburth Road, Liverpool, which at that point was a restricted dual carriage-way, keeping close to the offside when he came into collision with two men, one of whom was the plaintiff, who were crossing the road some 50 yards short of the junction with Aigburth Vale. The plaintiff sustained serious injuries, and the man with him died.

The plaintiff and his friend having spent the evening at a club in Aigburth Vale, appeared to have taken part in a brawl in the street outside, in the course of which the plaintiff struck and injured an elderly man. A crowd collected and a special constable ordered that the plaintiff and his friend should be apprehended. The plaintiff and his friend accordingly left in a hurry, turned into Aigburth Road, running past a bus which was just pulling away from a bus stop, and shortly after darted out into the carriage-way at an angle of about 45 degrees, and ran right across in front of the defendant's car.

The car was proceeding at about 30 miles an hour, and according to the judge was exhibiting headlights. However, neither the defendant nor his passenger saw the two men until they had got a substantial way across the road. The judge had little difficulty in deciding that the plaintiff was at fault and said that he was satisfied that the plaintiff's action was about as negligent and irresponsible as anything could be, with which his Lordship agreed.

It was said that notwithstanding the negligent action of the plaintiff, some proportion of blame ought to be attributed to the defendant, who should have seen the men running along the pavement. Even if the defendant had seen them, he could not have expected them to dart into the road in front of oncoming traffic: and even if he had seen them at the moment they darted out it was doubtful whether it would have been wise for the defendant to swerve over to his near-side.

His Lordship questioned the submission that it was the defendant's duty driving along that dual carriage-way to be on the look out for anybody darting out in this negligent and irresponsible manner.

The short answer to this appeal was to remember that the defendant's duty, like that of any other road user, was to exercise reasonable care. He was not under a duty to be a perfectionist. It would be going too far to say that in the circumstances surrounding this accident the defendant should have observed the negligent and irresponsible action of these two men earlier than he did. The judge was clearly right when he dismissed the claim and his Lordship would dismiss the appeal."

Willmer L.J. was then merely reaffirming and underlining what he had said two years earlier in another case, *Edwards* v. *Nobbs*,[2] as follows:—

"It is possible that the perfect and most expert driver might have done a little better. The standard, however, is not that of the perfect driver, but the driver using ordinary care and skill."

With respect, it seems to me that unless we hold that the development of the common law of negligence has now reached the stage of imposing strict liability on a person not to injure his neighbour, however blamelessly, we cannot demand that all drivers of vehicles should be perfectionists.

Turning to the instant case the fault of the taxi-driver was said to lie in his failure to reduce speed and keep a proper lookout. To be found wanting in these respects, however, I think there should have been a finding of fact not only as to the speed at which he was going but also the interval of time and space affording him opportunity to avoid the consequences of the other driver's recklessness after he should reasonably have anticipated danger. How far did visibility extend when the taxi reached the brow of the hill and both drivers were in sight of each other? How far apart were the two vehicles when the Penghulu gave unmistakable indication, if any, of his intention to cross the path of the taxi? To these questions I have been looking for an answer. It seems to me, therefore, that without these essential primary findings of fact the inference of any want of care cannot be legitimately drawn.

The learned trial judge had disbelieved the Penghulu when he said he stopped before attempting to cross. Assuming, then, that he was going at no more than 10 m.p.h. when about to make the right turn, the fact (a) that he was barely half-way over the centre line of a 20-foot road at the point of collision and (b) that, not the broadside, but the offside front of the car was hit by the offside front of the taxi in an almost frontal collision, seems to me clear and indisputable evidence that the car could only have started to cross over when the taxi was so close that no evasive action was possible, even had the taxi itself been going at the most moderate speed. So much as to the facts.

On the question of law it seems to me that the *dicta* of Lord Uthwatt in *London Passenger Transport Board* v. *Upson* [3] should be read as applying only where the surrounding circumstances plainly justify their application. As his Lordship said:—

"A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take."

In that case the accident had occurred at a busy pedestrian crossing in Baker Street and it was common experience, admitted by the bus driver himself, that in London pedestrians habitually stepped off pavements without looking to see that they could do so in safety. Even so, the driver is entitled to be exonerated in certain circumstances, as was Shaw when Brophy darted out in a "negligent and irresponsible manner."

The degree of care that need be kept while driving along an open country road is not quite the same as that which ought to be observed in a crowded city street. Merely because drivers of motor cars and motor-cycles do occasionally behave recklessly does not mean one must constantly anticipate that every other vehicle observed travelling normally is liable, without warning, to be driven, as if by a person suddenly gone mad. I do not think such extraordinary care and alertness is required of the motorist at all times he is on the road. Otherwise all vehicular traffic must grind to a standstill. What form of folly is to be regarded as foreseeable must depend on the surrounding circumstances of each case. I do not think any rule of general application should be laid down.

I would allow this appeal in respect of the 2nd appellant's liability for contributory negligence; the judgment of the learned trial judge is affirmed as to the finding of negligence against the 3rd respondent, who consequently is wholly liable.

The appellants will have their costs here and in the court below, in the form of the *Bullock order*.

Suffian and **MacIntyre F.JJ.** concurred.

Appeal allowed in respect of the 2nd appellant's liability; 3rd appellant's appeal dismissed.

Solicitors: *Murphy & Dunbar; Khoo & Sidhu.*

PUBLIC PROSECUTOR v. ABDUL HAMID

[A.Cr.J. (Syed Othman J.) October 30, 1968]
[Kuala Trengganu — Criminal Appeal No. 10 of 1967]

Criminal Law and Procedure — Power of court to summon and examine person to give evidence — Power to be exercised only for strong and valid reason — Criminal Procedure Code (Cap. 6), s. 425.

In this case it appeared that the learned magistrate at the trial called on the accused to enter upon his defence on a charge of voluntarily causing hurt with a parang, and the accused thereupon made his defence and alleged that the case against him was a frame-up. The learned magistrate then adjourned the case to call two witnesses, the *ketua kampong* and a police officer. Subsequently the learned magistrate found that on the evidence of the accused and the evidence of the court witnesses, the accused had shown a reasonable doubt in the case for the prosecution and he acquitted the accused. He did not however indicate what was the part of the evidence of accused or any of the court witnesses which created the reasonable doubt in his mind as to the case for the prosecution. The public prosecutor appealed.

Held: (1) the power given by section 425 of the Criminal Procedure Code to the court to summon and examine any person to give evidence must be exercised with the utmost caution and only when as set out in